Mac A. Fleming
President

William E. LaRue
Secretary-Treasurer

197283

Brotherhood of Maintenance of Way Employes
Affiliated with the A.F.L.-C.I.O. and C.L.C.

February 29, 2000

via messenger

Surface Transportation Board
Office of the Secretary
Case Control Unit, Attn: STB Ex Parte No. 582
1925 K Street, N.W.
Washington, DC 20423-0001

To whom it may concern:

Enclosed for filing with the Board are the original and ten copies of the joint Comments of the Brotherhood of Maintenance of Way Employes and Brotherhood of Locomotive Engineers in the above referenced proceeding. A copy of the Comments also is enclosed on the diskette and is convertible into WordPerfect 7.0 format.

Please stamp the extra enclosed copy of the Comments as received so that the messenger can return it to me. Thank you.

Sincerely,

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

COMMENTS OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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SUMMARY OF TESTIMONY OF THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

The Brotherhood of Maintenance of Way Employes ("BMWE") and the Brotherhood of Locomotive Engineers respectfully present to the Board their joint comments in this proceeding. The BMWE represents maintenance of way employees, those employees who build and maintain the tracks, bridges and buildings used by the railroads, on all Class I and many regional and short line railroads in the United States and Canada. The BLE represents locomotive engineers on all Class I and many regional and short line railroads in the United States and Canada as well.

Our comments will focus on the issue of "cram down," that is, the use of the exemption from all other law presently contained in Section 11321(a) of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") in the context of arbitrations under the *New York Dock* conditions[1] and the harm that use has caused to our members on railroads in the United States. The use of the "cram down" provisions to make wholesale changes in collective bargaining agreements ("CBA") has been, and continues to be, a destabilizing force in railroad labor relations. The use of the "cram down" provisions in rail mergers and consolidations is unnecessary and is viewed by the carriers as an alternative to give and take bargaining under the Railway Labor Act ("RLA"), 45 U.S.C. §151, *et seq.* The President and several members of Congress have expressed their opposition to the "cram down" status quo. Recently, several bills

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[1]The employee protective conditions first set forth in *New York Dock Ry.–Control–Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60, *aff'd sub nom.*, *New York Dock Ry. v. U.S.*, 609 F.2d 83 (1979).

have been introduced in Congress to eliminate "cram down" in the labor relations field. The most pointed of these is S. 1590 introduced by Senator Crapo (R-Idaho) which seeks the elimination of "cram down" and puts bargaining over the implementation of mergers were it rightfully belongs, between the parties under the RLA without the threat of compelled arbitration.[2]

Finally, the Board should take notice of the unconscionable actions of the Association of American Railroads ("AAR") when it reneged on an agreement to begin negotiations to end "cram down." In November, 1999, AFL-CIO Secretary/Treasurer Richard Trumka and AAR President Ed Hamberger reached an agreement that would provide an orderly end to the "cram down" process. The agreement provided, among other things, that the AAR members would observe a 3 year moratorium on the service of notices under Article I, Section 4 of *New York Dock* while the carriers and rail labor negotiated new rules to replace the use of "cram down" in Section 4 proceedings. Once those new rules were negotiated, they would be observed by the carriers until they were enacted into law as part of a larger Board reauthorization bill. There can be no doubt that such an agreement occurred, because Senator Hollings remarked on the floor of the Senate during the vote on the Chairman's renomination (Congressional Record: November 10, 1999 (Senate), Page S14475-S14477):

> Before I discuss Chairman Morgan's abilities and accomplishments, I would like to comment briefly on the agreement reached between railroad management and labor this week on the cram down issue. As many of you know, the carriers and their employees have been working on the terms of an agreement which would create new rules pertaining to the abrogation of collective bargaining agreements.

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[2]Also, H.R. 3163 introduced by Representative Oberstar (D-Minnesota) and H.R. 3398 introduced by Representative Nadler (D-New York) eliminate the use of "cram down" in the creation of implementing agreements.

> Yesterday, the parties agreed to a moratorium on the filing of section 4 notices while the negotiations take place to establish new rules. I am pleased that the parties were able to reach a compromise on this important issue and urge the STB to look favorably on this agreement. In addition, I expect to address this issue legislatively next year when we take up the STB reauthorization bill.

The AAR reneged on that deal when Ed Hamberger refused to sign the agreement. The elimination of the "cram down" provisions as they apply to CBAs in railroad mergers and consolidations remains a major priority for BMWE and BLE.

The use of the "cram down" provisions of the Interstate Commerce Act to abrogate or modify CBAs began with the former Interstate Commerce Commission ("ICC") in 1983. That discretionary policy decision *reversed* a long-standing policy on the part of the ICC to avoid involvement in railroad labor relations. As a result of this policy decision, the ICC, and its successor, this Board, fostered a climate where railroads looked to the *New York Dock* arbitration processes as a "carrier friendly" alternative to traditional collective bargaining under the RLA. Railroads viewed a *New York Dock* arbitration as a means to eliminate those provisions in CBAs they had been unable or unwilling to change in RLA bargaining. In one *New York Dock* case between UP and BMWE, the UP spokesman acknowledged the carrier recently had *agreed* in bargaining under the RLA not to do what UP now proposed to do under *New York Dock*. He said the earlier agreement was meaningless because *New York Dock* gave UP another way to obtain a rules change that it had not obtained at the traditional collective bargaining table. Similarly, BNSF threatened BMWE that if it could not obtain a seniority district consolidation favorable to it under processes contained in the CBA, it would begin a *New York Dock* proceeding to obtain an optimal result for itself.

Before beginning our comments on how "cram down" harms our members today, we believe it is important to look at the origins of the "cram down" provision in the Transportation Act of 1920. This historical view shows beyond any reasonable doubt that the current ICC/STB policy on the use of "cram down" is *discretionary* and is inconsistent with the ICC's handling of the issue before 1983.

I. "CRAM DOWN" BEFORE 1983

A. The Transportation Act of 1920

The Transportation Act of 1920 was a revolutionary piece of legislation. The Act passed Congress coincident with the return of the railroads from Federal control exercised during World War I. The 1920 Act was significant for two reasons. First, the Act set forth the national rail transportation policy as one that favored the unification and consolidation of the nation's railroads. Second, the federal government, through the ICC, was to direct those unifications and consolidations. Under the Act, the ICC was charged with developing a master plan for the consolidation and unification of the nation's railroads.

The inclusion of the cram down provision makes sense in that context. If the federal government now was to regulate railroad mergers, those mergers could not be subject to competing and conflicting state laws. Also, because earlier voluntary railroad unifications had been successfully challenged under the antitrust laws, a specific exemption from those laws was necessary to permit the mergers and consolidations to go forward. In other words, the cram down provision had a limited, yet quite important, legal role to play. There is absolutely nothing

in the legislative history or decisions of the ICC and the courts that suggests the cram down was applicable to railroad labor relations matters.[3]

B. The Transportation Act of 1940

Congress amended the Interstate Commerce Act ("ICA") in 1940 to remove the ICC as the "master planner" of rail mergers. Instead, the 1940 Act promoted voluntary mergers and consolidations among railroads. The "cram down" provision remained unchanged.[4]

During the 1940's the Supreme Court twice addressed the impact of the "cram down" provisions. In both cases, the "cram down" was used in the manner originally intended, that is, the removal of impediments to a merger created by inconsistent state laws.

Also during this period, the ICC expressly disclaimed any authority or expertise to intervene in railroad labor relations. In its 1967 decision in *Southern Ry.–Control–Central of Georgia Ry.*, the ICC expressly rejected the carriers' contention that the "cram down" provisions relieved them of their obligations under the CBAs. The ICC's exact language deserves citation (331 I.C.C. at 170):

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[3]The predecessor of the Railway Labor Act was included in the 1920 Act as Title III. Title III was replaced by the RLA in 1926. The history of the RLA is relevant here for two reasons. First, the Act was the product of an agreement between the railroads and rail labor that was adopted by Congress. Second, the RLA's birth was the product of the unsatisfactory experiences of the parties under the Railroad Labor Board established under Title III. That Board, whose decisions were not legally enforceable, issued findings that modified CBAs and unilaterally suggested wage cuts. Indeed, it was the meddling of the Board into railroad labor relations that led to the 1922 Shopmen's strike, the largest strike in U.S. railroad history.

[4]The 1940 Act also provided for mandatory ICC imposition of conditions for the protection of employees adversely affected by approved mergers. Despite a convenient "myth" propogated by the railroads, the protective conditions are not a *quid pro quo* for the use of the "cram down" on CBAs. A close review of the Act's legislative history reveals not even an inkling of this supposed "deal."

> Of equal importance, this contention of the applicants is demonstrably erroneous. By its terms, section 5(11) [the "cram down" provision] applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved ...'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms.
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> * * *
>
> The designated 'exclusive and plenary power' of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws–be they statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law.

Similarly, in *Chicago, St. Paul, Minneapolis & Omaha Ry.–Lease*, 295 I.C.C. 701, 702 (1958) the ICC offered its limited view of the effect of the "cram down" provisions on collective bargaining thus (emphasis added):

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect is what North Western requests us to do. It is apparent that the Railway Labor Act has *not prevented* the North Western from *effectuating* the transaction authorized by the prior order. That order authorized the lease of the North Western of the line of railroad and other properties owned, used, or operated by the Omaha, and *this has been accomplished. The order did not provide for any particular method for integration of the physical operations involved*, and, except for the imposition of the above-mentioned conditions for the protection of employees, did not deal with employer-employee relationships.

As late as early 1983, in *Bhd. of Locomotive Engineers v. Chicago & North Western Transp. Co.*, 360 I.C.C. 857, 861 (1983), the ICC acknowledged its absence of "expertise to place ourselves into the field of collective bargaining or labor management relations."

II. "CRAM DOWN" SINCE 1983

In a 1983 trackage rights case, the ICC held for the first time that the "cram down" provisions overrode CBAs that "impeded" a carrier's carrying out of an approved transaction. Finance Docket No. 30000 (Sub-No. 18), *Denver & Rio Grande Western Ry.–Trackage Rights–Missouri Pacific R.R.*, served October 19, 1983 (not printed). Subsequently, in two *New York Dock* arbitrations, the arbitrators relying upon the *DRGW* decision held that CBAs could be overridden in the course of creating an implementing agreement providing for the selection of forces and assignment of employees affected by a merger. These two arbitral awards spawned the *Carmen* line of cases which persisted in litigation until September 1998.

The arbitral awards were affirmed by the ICC. The Unions appealed and prevailed before the D.C. Circuit. The losing railroad successfully took the case to the Supreme Court and prevailed. The Court's 1991 decision in *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 132 (1991) found that the "cram down" could apply to CBAs. However, the Court expressly stated that it offered no opinion on what constituted the "necessity" predicate for the "cram down" provision's use. *Id.* at 134. The battle since has been over the definition of "necessity."

A. Cram Down since Dispatchers

In 1993, the D.C. Circuit held that in order for a CBA change to be "necesssary" the carrier must show "that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction ... The benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety or some other gain." *Ry. Labor Executives' Ass'n v. I.C.C.*, 987 F.2d 806, 815 (D.C. Cir. 1993) This Delphic pronouncement has been adopted by the STB

as the discretionary standard for the use of the "cram down" in a *New York Dock* Section 4 arbitration. Finance Docket No. 28905 (Sub-No. 22), *CSX Corp.–Control–Chessie System Inc. & Seaboard Coast Line Industries, Inc. (Arbitration Review)*, slip op. at 25-27, served September 25, 1998 ("*Carmen III*").

Relying on this vague standard of "necessity", the ICC/STB sanctioned the override of CBAs in the following circumstances:

- Carrier can rely on employee protective conditions imposed in transaction approved by the ICC over 30 years earlier to seek authority to override collective bargaining agreements. FD 28905 (Sub-No. 27), *CSX Corp.–Control–Chessie System Inc. & Seaboard Coast Line Industries, Inc. (Arbitration Review)*, at p. 9 served (December 7, 1995).
- Language in an implementing agreement between a carrier and a union that any changes in the agreement would be made pursuant to Railway Labor Act procedures was "boilerplate" that was not binding upon the carrier in a subsequent *New York Dock* arbitration. FD 28905 (Sub No. 27) at p. 12; see also FD 28905 (Sub-No. 26), *CSX Corp.–Control–Chessie System Inc. & Seaboard Coast Line Industries, Inc. (Arbitration Review)*, served April 29, 1996.
- The Board overrules an arbitrator's finding that a carrier's attempt to merge seniority districts 11 years after ICC approval of a merger is not a *New York Dock* transaction; ICC vacates decision. FD 30000 (Sub-No. 48), *Union Pacific Corp.–Control–Missouri Pacific Corp. (Arbitration Review)*, at pp. 7-9, served July 31, 1996.

There is no reported case where the ICC/STB overruled an arbitral finding that a CBA must be abrogated. Indeed, since 1983, there are only two reported arbitral awards that have preserved a CBA in the face of a carrier's request to override or modify it. The first occurred in a transaction involving a small railroad in Wisconsin, the Fox Valley & Western Ltd., a subsidiary of Wisconsin Central, Ltd. Finance Docket No. 32035 (Sub-No. 1), *Fox Valley & Western Ltd.–Exemption Acquisition & Operation–Certain Lines of Green Bay & Western R.R. (Arbitration Review)*, served December 19, 1994. The other recently on the UP in a decision issued by the Board on February 24, 2000. Finance Docket No. 32760 (Sub-No. 36), *Union Pacific Corp.–Control & Merger–Southern Pacific Rail Corp. (Petition for Enforcement of Arbitration Award)*, served February 25, 2000. However, the UP refused to implement the transaction as proposed in the Award so that decision presently has no practical impact.

In 1998, the Board finally issued its decision on remand from the *Dispatchers* case. That decision, called "*Carmen III*" continued to adhere to policy position that "cram down" was available in *New York Dock* arbitrations. While the arbitrator in the UP case mentioned above believed *Carmen III* required him to preserve an agreement that he believed better served the interests of employees, the Board's review of that Award merely found that his finding was within the scope of discretion granted to him. FD No. 32760 (Sub-No. 36) at 5. The Board could have said the Arbitrator was right because his decision was compelled by *Carmen III*. Instead, the Board left "cram down" in the nether world of discretionary policy. Therefore, the issue of whether or not the decision in *Carmen III* signified a change in Board policy regarding "cram down" remains unresolved.

Also, there are arbitral awards that have not been appealed or have settled on appeal where "cram down" was used to override or modify agreements. In those cases, either BMWE or BLE settled the dispute because of a lack of faith in the review process. The reason for this lack of faith is simple. As stated earlier, the aggressive use of "cram down" was a policy decision initiated by the ICC in 1983 that has been carried forward today. Therefore, a party bringing an appeal against the use of "cram down" to the Board, is making an appeal to the same institution that aggressively sanctioned its use in the first instance. That perception, coupled with the fact that the ICC/STB has never *overruled* an arbitrator who ordered the abrogation or modification of a CBA, a post-appeal settlement that even marginally improves the arbitral award is something BMWE and BLE usually could not pass up.

III. INSTANCES OF HARM TO BLE AND BMWE REPRESENTED EMPLOYEES THROUGH THE USE OF "CRAM DOWN"

A. Harm to BLE Members

The following sets forth the particular harm "cram down" inflicted on BLE members in the UP/SP merger and carve-up of Conrail between CSXT and Norfolk Southern:

- Union Pacific

  - On UP/SP, the majority of BLE collective bargaining agreements in effect prior to the merger were completely eliminated. Generally speaking, UP had the unilateral right to determine which CBAs would survive, as a result of the Yost Award, rendered in a UTU *New York Dock* case involving the Salt Lake City Hub.

- Cram down also permitted the restructuring of the entire merged UP/SP system, through the "hub and spoke" concept, rather than merely coordinating joint or parallel facilities. The "hub and spoke" arrangements vastly expanded many seniority districts, and reduced the available prior seniority of engincers. This forced many engineers to relocate, and many more to become familiar with, qualified on and operate over completely new territory in order to protect their earnings guarantees, regardless of whether or not they could hold work on the portion of their former seniority district over which they no longer had rights. Implementation of the Houston Hub was such a disaster that BLE essentially was forced to agree to allow non-agreement personnel to operate trains for three months, just to break the gridlock.
- By virtue of UP's selection of almost exclusively former UP CBAs, cram down eliminated provisions in the calling rules of the former SP CBAs that provided for optional extra rest time. This exacerbated preexisting fatigue problems.
- Similarly, cram down will result in the elimination of company-paid disability insurance benefits for former SP engineers six years after the effective date of the

elimination of former SP CBAs, because of their treatment as a "benefit" for *New York Dock* purposes.

- Conrail carve-up
  - On the portions of Conrail assimilated into NS, the BLE-Conrail CBA was eliminated, and replaced with one of two NS CBAs. The portion of Conrail placed under the former Southern Railway CBA shares just one common point with the NS — at Hagerstown, Maryland — and constituted an "end-to-end" merger. All switching work at Hagerstown was performed by Conrail engineers, and no assignments operate over both former properties. Nevertheless, NS eliminated the Conrail CBA simply because cram down enabled them to do so.
  - The elimination of the Conrail CBA by NS also resulted in a substantial cut in the hourly, daily and mileage rates of pay for engineers, because the last NS settlement froze rates of pay at 1996 levels, and provided for bonuses in accordance with a profitability formula. NS's poor performance since the merger resulted in no bonuses being paid for 1999. Although a tentative contract settlement that is out for ratification calls for "snapping back" wage rates to December 31, 1999, levels prior to further application of

the bonus formula, the fact remains that cram down produced a real wage cut for which *New York Dock* provided only six years' protection.

- Cram down also has resulted in the creation of enormous seniority districts. The former BLE Conrail seniority districts placed under the NS's Southern Railway CBA were merged into a single district that runs from Newark, New Jersey, on the eastern end, to Pittsburgh, Pennsylvania, on the western end. As the Board should know, NS has taken the position — in a Clerk's case — that employees who wish to protect their *New York Dock* protective allowances must "follow their seniority," even if that means relocating.

B. Harms to BMWE Members

- Union Pacific

  - UP compelled arbitration to create new system gang operations involving the territories of the former UP, Southern Pacific (Pacific Lines, west of El Paso, Texas), Western Pacific and Denver & Rio Grande Western. Arbitration occurred even though the UP had agreed under the RLA not to extend system gang operations in the manner it sought under *New York Dock*. The result of the arbitration was to create a single "system" seniority district stretching from Portland, Oregon and Los Angeles,

California in the West to El Paso and Omaha, Nebraska in the East. The BMWE appealed but settled the appeal when UP agreed to let pre-merger employees have the option of leaving the system gang when it left the employee's "prior right" home road.

- Under threat of a *New York Dock* arbitration, UP obtained the complete integration of the former Missouri Pacific, Southern Pacific (Eastern Lines), St. Louis Southwestern Railway (Cotton Belt) and SPCSL. All employees were placed under the Missouri Pacific agreement, seniority districts were enlarged. System operations extend from Chicago, Illinois to Tucumcari, New Mexico and from El Paso to New Orleans, Louisiana.

- Conrail carve-up

  - NS and CSXT forced rapid arbitration of the division of BMWE-represented employees on Conrail between the two carriers. Case was decided by arbitrator William Fredenberger who three months later pled guilty to a federal felony charge of income tax fraud.
  - Conrail employees allocated to NS under the award were placed in a single Region running from Philadelphia, Pennsylvania to Peoria, Illinois. Before the award, Conrail operated about six seniority districts in that same area. While "prior rights" apply to positions within this area, all new hires have "regional" seniority only.
  - All Conrail employees allocated to NS were placed under the Norfolk & Western CBA, which resulted in a $1.50 to $2.00 per hour cut in pay.

Virtually all Conrail employees allocated to NS have been certified as "displaced" employees under *New York Dock*. However, income protection expires in 2005 and all wages will "snap back" to whatever the negotiated N&W rate is on that date. The wage cut in arbitration is a major topic in current collective bargaining between BMWE and NS, thereby causing additional instability in labor relations.

- Recently, NS laid-off 550 maintenance of way employees, amounting to an across-the-board 10 to 12% force reduction. While NS claims the furloughs are not merger-related, no doubt to avoid *New York Dock* liability, recent declines in NS's stock price and diminishing cash on hand related directly to the Conrail acquisition clearly played a major role in the force reduction.
- After the division of Conrail, CSXT began a massive amount of subcontracting maintenance of way work even though a Federal Railroad Administration audit of the pre-acquisition CSXT manpower found the carrier about 700 employees below the level needed for basic system maintenance and production.

IV. RECENT AND PENDING TRANSACTIONS

Last year, the Board approved the merger of Canadian National and Illinois Central. BMWE actively supported that merger. The reason is simple, CN/IC stepped forward and acknowledged the unrestrained use of "cram down" made no long-term sense in railroad labor relations. Instead, CN/IC came forward with a reasonable operating plan and sought BMWE's

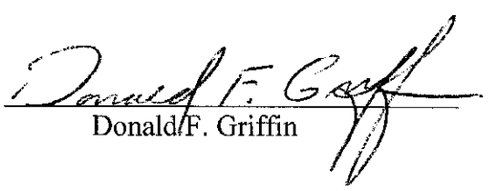
advice and input on how forces could be reconfigured to make the operating plan work. Together, BMWE and CN/IC developed an implementing agreement that caused a minium of disruption to employees. Significantly, CN/IC also agreed they would not use "cram down" to try to extend system gang operations or create a single CBA. The Board adopted that Agreement as a condition of its approval of the merger. BMWE has a good working relationship with CN/IC, helped in no small part by its realization that "cram down" causes more problems long-term than it is worth.

Recently, BNSF and CN announced a proposed combination. BMWE and BLE are talking to the carriers to see if a settlement is possible. Talks have been frank, but at this point have not led to firm commitments. Both BMWE and BLE remain neutral regarding the proposed combination at this time, but both could support the proposed combination if the appropriate commitments are made by BNSF/CN.

CONCLUSION

The ICC/STB's sanction of the use of the "cram down" provisions of the ICCTA to override and modify CBAs is wrong. "Cram down" distorts collective bargaining because what is agreed to through give and take bargaining can be taken away by a *New York Dock* arbitrator. The Board should expressly renounce the use of "cram down" in *New York Dock* arbitrations.

Respectfully submitted,



Donald F. Griffin

Dated: February 29, 2000